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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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DAVID A. HARPER,

Plaintiff,

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v.

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STATE BAR OF CALIFORNIA, et al.,

Defendants.

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Case No. [18-cv-01630-EMC](#)

**ORDER DENYING PLAINTIFF'S
MOTION TO VACATE JUDGE'S
DISMISSAL**

Docket No. 16

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Based on the recommendation of the magistrate judge, the Court dismissed Plaintiff's complaint and entered judgment for Defendants on June 19, 2018. *See* Docket Nos. 14 and 15. Subsequently, Plaintiff filed a motion requesting the judgment be vacated, allegedly because he did not receive a copy of the magistrate judge's recommendation even though it was mailed to his address and he admits receiving all other materials mailed by the Court to the same address. *See* Docket No. 16. Plaintiff also requested additional time to file objections. Plaintiff then filed a notice of appeal from the Court's judgment. *See* Docket No. 18.

"In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). Under the rules of appellate procedure, however, a notice of appeal that is filed before a motion to alter or amend a judgment under Rule 59(b) or Rule 60 "becomes effective . . . when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i). The Court construes Plaintiff's request as a timely motion under Rule 59(e) to alter or amend the judgment; thus, the notice of appeal has not yet taken effect and the Court retains jurisdiction.

Relief under Rule 59(e) is appropriate if "(1) the district court is presented with newly

1 discovered evidence, (2) the district court committed clear error or made an initial decision that
2 was manifestly unjust, or (3) there is an intervening change in controlling law.” *Zimmerman v.*
3 *City of Oakland*, 255 F.3d 734 (9th Cir. 2001). That criteria is not satisfied here. It was not clear
4 error or manifestly unjust to adopt the magistrate judge’s recommendation after the time period for
5 objections had lapsed when the court files contained *prima facie* evidence that Plaintiff was served
6 with the magistrate judge’s recommendations. *See* Docket No. 10-4 (proof of service). Further,
7 Plaintiff has not advanced any argument why dismissal was erroneous on the merits. Accordingly,
8 his motion is **DENIED**.

9 This order disposes of Docket No. 16.

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IT IS SO ORDERED.

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Dated: July 20, 2018

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EDWARD M. CHEN
United States District Judge